Filed 4/8/10 P. v. Hernandez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO HERNANDEZ,

Defendant and Appellant.

F056274

(Super. Ct. No. BF122582A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant was convicted of crimes arising from his sexual molestation of his girlfriend's seven-year-old daughter, M. (victim). On appeal, defendant contends (1) the trial court erred when it admitted DNA statistical evidence, (2) the trial court erred by instructing the jury that the act supporting count 1 occurred "on or about" a certain date, and failing to instruct on unanimity as to that count, and (3) the charges in count 2 violated the notice requirement of due process. We will affirm.

PROCEDURAL SUMMARY

On April 21, 2008, the Kern County District Attorney charged defendant with sexual intercourse with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a);[1] count 1) and lewd and lascivious act on a child under 14 years of age (§ 288, subd. (a); count 2). The information alleged that the crime charged in count 1 occurred "on or about March 8, 2008," and the crime charged in count 2 occurred "on or about and between September 1, 2007 and March 1, 2008."[2] (Capitalization omitted.)

A jury found defendant guilty on both counts. The trial court sentenced him to a 25-year-to-life term on count 1 and a consecutive two-year term on count 2, for a total of 27 years to life in prison.

FACTS

Defendant lived with his girlfriend (mother) and her three children—victim, her brother, A. (brother), and their older sister, J. (sister). In addition, defendant and mother had a baby together. At the time of trial, victim was eight years old, brother was 11 years old, and sister was 13 years old.

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1 All statutory references are to the Penal Code unless otherwise noted.

2 Count 2 originally alleged that the crime occurred on or about and between January 1, 2007 and September 1, 2007. The prosecution amended the information to conform to the evidence at trial.

Victim testified that one evening in October 2007, while brother was in the shower, she was asleep in her bed and felt someone on top of her. She heard mother knock on her door and defendant got off of her and answered the door. Victim did not say anything to mother or anyone else because she was afraid no one would believe her.

Defendant had worked at a nursery for about six months. He often took victim and brother with him to the nursery on Saturdays to water the plants. On more than five occasions, defendant sexually molested victim at the nursery.

The last incident occurred on March 8, 2008.[3] Victim testified that she and brother went to work with defendant at the nursery that day. While victim and brother were moving plants, defendant came to get victim. There were no customers at the nursery at that time. Defendant took victim into a yellow shed, took off her pants and panties, and took off his own pants and underwear. He laid victim on her back on a banner on the dirt floor. He opened her legs and put his penis inside her vagina, causing her pain. When defendant was done, victim got dressed and left the yellow shed. She found brother and told him what had happened.

When they got home, victim took a shower. That night, she told mother what had happened because she did not want defendant to hurt her anymore. Mother revealed to victim that she had also been molested as a child, and said she would put defendant in jail if he had molested victim.

According to victim, during approximately January through March 2008, and prior to the incident on March 8, defendant put his penis in her vagina in the yellow shed more than four times. She did not tell anyone because defendant had threatened to hurt her family if she did. He said he would go far away.

Victim did not like going to the nursery with defendant. She went because brother wanted her to help him. They would stay there all day while defendant worked from

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[3] Henceforth, March 8 refers to March 8, 2008.

8:00 a.m. to 5:00 p.m. She obeyed defendant because he was like a stepfather to her and she was supposed to do what he said. Sometimes when she went to the nursery, she would get hurt and have blood in her panties. She would tell her mother that she had hurt herself, although she had not.

About a week and one-half prior to the March 8 incident, victim got blood in her panties while she was at the nursery because defendant put his penis in her vagina in the yellow shed, causing her to bleed. Victim did not tell her mother because she was afraid. But when victim was going to sleep that night, she told sister there was blood in her panties. Mother testified that sister told her about the blood, but it was a single drop and victim claimed she had just been playing. Mother wanted to take victim to the doctor, but victim insisted she was fine. Mother later washed the panties.

Brother testified that he and victim went to work with defendant at the nursery on Saturdays to water the plants. Defendant was like a stepfather and brother was supposed to obey him. On March 8, victim and brother were watering plants when defendant came and took victim away. Defendant told brother to keep watering the plants. After a while, victim walked back to brother and she was crying. She told him that defendant took her to the yellow shed, laid her on a poster, and put cream on her vaginal area. Brother told victim to stay with him and she would never go with defendant again. When they got home, brother and victim stayed together. Later, they told sister what had happened, and then the three of them told mother.

Brother testified that in approximately February 2007, defendant exposed himself to brother when they were alone in the nursery office. Brother was in the doorway and defendant was standing in the office with his pants down. Defendant told brother to come toward him and asked him if he liked boys. Brother told defendant he was crazy and took off running. Brother did not tell mother about the incident at that time because he was afraid defendant would hurt someone in his family. Brother finally told mother on the night of March 8.

Brother disliked defendant because he hit them. Sister had told defendant she would call the police if he did not stop hitting them.

Mother testified that on the night of March 8, her children told her what had happened at the nursery. Victim also told her about the incident in the bedroom that occurred when mother went to the store and defendant told brother to take a shower; victim said defendant told her the next day he had molested her. Victim told mother defendant had been threatening her and that was why she had not said anything. Brother also told mother about defendant's attempt to molest him. After speaking to the children, mother looked for defendant's small bag that he wore on his waist when he worked at the nursery. Inside the bag, mother found a bottle of cream that victim had described to her. Victim identified it as the cream defendant had used.

Mother did not call the authorities that night because she was afraid defendant would realize something was wrong and possibly hurt the children. So she put the three children together in one room and kept the baby with her. The next morning, she took them to a friend's house and called the authorities. Officers came to the friend's house to make a report. Victim told them what defendant had done and what clothes he had worn. She identified the bottle of cream he had used on her vaginal area. That evening, officers informed mother they had arrested defendant. When mother returned to the house with the officers, she identified the clothing defendant and victim had worn the day before. The officers seized the clothing. Victim was taken to the hospital for examination.

Mother testified that she and defendant had engaged in sexual intercourse about three or four days before March 8.

On March 9, 2008, Nurse Harris performed the sexual assault examination on victim. Victim was a little teary, but she was able to explain what had happened. When Harris attempted to physically examine her, however, she cried and screamed in pain. Harris had to sedate victim for the examination so she would not endure any further trauma. The examination revealed a laceration to the posterior fourchette, evidence of a

forceful penetration. Victim also suffered vaginal bruising and a complete transection or cut of the hymen. When the nurse moved the hymen, she noticed some bleeding. There was also evidence of scarring from an old injury. Overall, the evidence was consistent with the history of abuse reported by victim. The nurse concluded that sexual abuse was highly suspected.

On March 12, 2008, a social services worker interviewed victim while Detective Aseltine, the lead investigator on the case, observed through a one-way mirror. In the interview, which was recorded and transcribed, victim described the yellow shed. She explained that defendant put her down on the big banner (which she described) on the ground, opened her legs and put his penis in her vagina. She said it felt bad. Defendant told her not to tell anyone or he would make her family suffer by doing something. She was afraid defendant would do the same thing to her baby sister when she grew up.

Aseltine investigated the nursery, and later took victim with him there. Victim identified the yellow shed and the banner, which Aseltine seized. According to Aseltine, the yellow shed smelled like dirt; it did not smell like urine and he saw no feces on the ground. There was an outhouse on the property.

The banner from the yellow shed tested positive for semen. The semen stains were cut out of the banner and prepared for DNA analysis.
Defendant's underwear were swabbed for sperm. All the items were sent to the Serological Research Institute (SERI) for DNA analysis.

Gary Harmor, a forensic scientist at SERI, testified that he received six pieces of evidence for analysis. The banner material contained a high number of sperm cells, but no apparent epithelial cells. The sperm cells came from a single person and the genetic profile of that person matched defendant's genetic profile at all 15 markers or loci tested. According to Harmor's statistical analysis, the chance that someone unrelated to

defendant would have that genetic profile was about 1 in 529 quintillion.[4] Defendant could not be excluded as the donor of the sperm on the banner. Harmor testified that some sperm can be passed via urination, the amount depending on how soon after ejaculation urination occurs, but that the large number of sperm on the banner was not consistent with someone urinating after having sex the night before.

On victim's panties, Harmor found epithelial cells and one sperm cell. (Harmor had no doubt it was a sperm cell; he could easily discern a single sperm cell from other types of cells, including yeast cells.) The genetic profile of the epithelial cells matched victim's genetic profile at all 15 loci. Harmor did not test the single sperm cell because doing so would have been extremely difficult.

On defendant's underwear, Harmor found both epithelial and sperm cells. As expected, the genetic profile of the sperm cells matched defendant's genetic profile at all 15 loci. Again, the frequency of that genetic profile in the population was about 1 in 529 quintillion. The epithelial cells found on defendant's underwear provided a mixture of DNA from defendant and at least two minor donors, one of which matched victim's genetic profile. The frequency of victim's genetic profile in the population was about 1 in 7,850. Another minor donor might have been mother, but a sample of mother's DNA had not been submitted to Harmor for testing.

Tammi Noe, a forensic scientist at the Kern County Regional Crime Laboratory, was later asked to analyze a reference sample of mother's DNA to compare to Harmor's results. Noe determined that mother was a possible minor donor of the DNA mixture found on defendant's underwear. According to the database used by Noe (Pop Stats), the

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4 We take judicial notice that a quintillion is defined as 10^{18} (a number followed by 18 zeros). (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 798.)

Harmor testified that he performed the statistical analysis of genetic profiles, using the database published in the manual that accompanied the kit he used. His procedure was commonly used in the scientific community.

frequency of mother's genetic profile was 1 in 710 in the Hispanic population, 1 in 4,700 in the Caucasian population, and 1 in 13,000 in the African American population.[5] Noe also noted that a comparison of mother's genetic profile and victim's genetic profile suggested that mother was indeed victim's mother.

Defense Evidence

Sister testified that on the evening of March 8, she and mother were at the mall. While they were there, mother told sister, as she had before, that mother's uncle had raped her when she was a child. Mother and sister got home at about 9:00 or 10:00 p.m.

That night, victim told sister what defendant had done to her that day at the nursery. Victim said defendant had done the same thing to her more than five times, including once while she was asleep. Brother told sister he had seen defendant pull down his pants and do things to victim. Brother also told sister about the incident in the office.

Sister testified that in the past, when defendant hit her and brother, she told defendant that if he did anything to them, she would send him to jail.

Efrain Mejia, the owner of the nursery, testified that he hired defendant in November or December 2007. Business at the nursery was very slow in the winter months and defendant worked there alone. Mejia had seen the children there a few times.

Ezequiel Gabriel met defendant when defendant worked at the nursery. Gabriel started working there in August 2008. Although the nursery was in a high-traffic area, customers came very infrequently.

Defense Investigator Lostaunau visited the nursery. When he went inside the yellow shed, he noticed the distinct smell of urine. He said the traffic outside the nursery was heavy, with a number of businesses nearby. Lostaunau contacted mother by telephone, but she said she did not wish to speak to him. On cross-examination, Lostaunau admitted he visited the yellow shed in August and he had no idea if the yellow

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5 Noe did not testify as to whether she tested all the loci Harmor tested.

shed had smelled like urine on March 8, 2008. On redirect, Lostaunau said the photograph he took in August showed a roll of toilet paper in the shed. On recross-examination, Lostaunau agreed it appeared that the same roll of toilet paper was in the March photograph. He said he did not see any feces on the ground in the shed.

DISCUSSION

I. Admission of DNA Statistical Evidence

When a perpetrator leaves his DNA behind after committing a crime—usually in the form of sperm, hair, saliva, or blood—his genetic profile can be created.[6] Then, when a suspect's genetic profile matches the perpetrator's genetic profile, the suspect becomes a possible perpetrator. Although the match itself means the suspect *could be* the perpetrator, the probability that the suspect *is* the perpetrator depends on the frequency with which that genetic profile appears in the relevant population(s). (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 576 (*Pizarro*), disapproved on other grounds in *People v. Wilson* (2006) 38 Cal.4th 1237, 1250-1251.) The rarer the genetic profile, the more likely the suspect *is* the perpetrator. (*Pizarro, supra,* at p. 576.) Thus, the statistical analysis of genetic profiles, which puts a number on that rarity, generates powerfully incriminating evidence. (*Ibid.*)

Here, defendant contends the trial court erred under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) when it admitted the DNA statistical evidence. For reasons we will explain, we see no reversible error.

A. The Hearing

At the evidentiary hearing in this case, only Harmor testified. He explained that in his laboratory, he analyzed DNA samples and created genetic profiles with the Identifiler

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[6] A profile is based on the lengths of specific DNA segments (alleles) at particular locations (loci) on the DNA.

kit produced by Applied Biosystems.[7] Then, to perform the statistical analysis of the genetic profiles, he used the Identifiler kit's allele frequency database table (the database), provided in the kit's manual, to calculate the allele frequency for each of the resulting alleles in each of the three major racial groups in the United States: Caucasians, African-Americans, and Hispanics. Harmor followed recommendations of the National Research Council to render the data more conservative (favorable to a defendant).[8] Harmor increased up to five those allele counts that were less than five (making them more common in the population), and he multiplied frequencies by a theta factor of 0.01 to account for possible inbreeding in the population. Applying the product rule, Harmor multiplied the separate allele frequencies together to arrive at three profile frequencies, one for each of the three racial groups.

Harmor testified that he, like the other scientists in the SERI laboratory, applied one more step to the analysis. In the absence of information regarding the perpetrator's racial group, the scientists calculated a single profile frequency for the general population. To do so, they used data from the 2000 United States census, multiplying the number of people in the racial group with the profile frequency in that population, then adding each racial group figure together. This resulted in a weighted average to

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7 As the People note, the reporter's transcript describes this kit as the "identity filer," but the kit produced by Applied Biosystems is called the Identifiler. This kit utilizes the polymerase chain reaction (PCR). (<https://products.appliedbiosystems.com/ab/en/US/adirect/ab?cmd=catNavigate2&catID=600801> [as of April 8, 2010].)

8 In 1996, the National Research Council published a report, The Evaluation of Forensic DNA Evidence (hereafter NRCII), that includes various recommendations for forensic DNA analysis. "[A]lthough NRCII is an extremely helpful scientific and technological resource, it does not have the authority to 'resolve' legal issues of relevance. Indeed, NRCII does not claim to make legal conclusions and expressly recognizes the role of courts in determining how best to import science and technology into the trial and in resolving the legal issues that arise in that process." (*Pizarro*, *supra*, 110 Cal.App.4th at p. 633, fn. 85.)

approximate the profile's frequency in the general population. Harmor clarified that although he calculated this additional frequency, his report contained the three separate frequencies for the three racial groups and he could also provide those frequencies.

On cross-examination, Harmor explained that statisticians at Applied Biosystems, the company that produced the database, analyzed and conducted the appropriate statistical tests on the database prior to releasing it. If the database had not passed all the tests, it would not have been published and would not be used by forensic scientists. The database included samples taken from all over the United States, although Harmor did not have the information regarding the specific origin of the samples. Harmor said the database was published in 2001 or 2002, but he did not know when the data had been collected or when the database would be updated. Nor did he know the percentage of error in the data collected.

Harmor was aware of several other laboratories that used the database. Many governmental agencies used the FBI's database, but non-governmental laboratories, such as SERI, were not allowed to use it. The director of Harmor's SERI lab had unsuccessfully requested access to the FBI database.

Following Harmor's testimony, defense counsel argued that Harmor used the database without knowing its accuracy, reproducibility, or confidence level. He simply relied on it. Furthermore, the data in the database were at least eight years old and therefore did not account for changing migration patterns in the United States. Counsel argued Harmor did not know where the database's samples had come from, and there might be a large difference between a California database and a Florida database. Counsel said Harmor's results relied on flawed data that were not accurate within any degree of scientific certainty. Counsel stated he was making a *Kelly* objection "as to the applications" of the database.

The court asked defense counsel if he had consulted any experts for the purpose of presenting evidence to refute or contradict the methods and protocols followed by

Harmor. Counsel responded: "Your Honor, there [aren't] any methodologies to [re]view. He doesn't know what they are. We don't have that. That's the problem. It's an unknown. He doesn't know, it's just used. [¶] It's like flying an airplane, get somewhere but you don't know how we did it. Just did it. And so there isn't anything to review."

The court overruled the *Kelly* objection, finding that the procedure used by Harmor was generally accepted by the relevant scientific community. The court stated it appreciated defense counsel's argument regarding Harmor's reliance on a database prepared by others, but noted that scientists frequently rely on the work of other scientists in performing their tasks. The court concluded the database was generally accepted in the relevant scientific community. The court noted that defendant could cross-examine Harmor and the jury would determine what weight to give his opinions.

B. The Law

The *Kelly* test is an evidence-screening device targeting sophisticated scientific evidence that, although not readily understood by lay jurors, tends to be highly convincing. (*Pizarro*, *supra*, 110 Cal.App.4th at p. 555.) "In the *Kelly* review process, the trial judge serves as gatekeeper, allowing only evidence that is sufficiently reliable and trustworthy to reach the jurors." (*Ibid.*) Because of the immense power of scientific evidence, the *Kelly* test goes to the admissibility, not the weight, of the evidence. (*Kelly, supra*, 17 Cal.3d at pp. 30-32.)

Kelly explained its three-prong test as follows: The "admissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used

in the particular case. [Citations.]" (*Kelly, supra,* 17 Cal.3d. at p. 30.) We turn to a discussion of prongs one and three, which are the prongs relevant in this case.

1. *Kelly*'s First Prong

Under the first prong of *Kelly*, a new scientific method is considered reliable when it has attained acceptance in the relevant scientific community. (*Kelly, supra,* 17 Cal.3d at pp. 30-32 [noting California had adopted this test from the federal case of *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013 (*Frye*)][9].) This "approach [is] designed to ensure '"that those most qualified to assess the general validity of a scientific method will have the determinative voice."' [Citation.]" (*People v. Superior Court* (*Vidal*) (2007) 40 Cal.4th 999, 1014.)

The question of general scientific acceptance may be answered by prior case law: "[O]nce a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community." (*Kelly, supra,* 17 Cal.3d. at p. 32; *People v. Venegas* (1998) 18 Cal.4th 47, 53 (*Venegas*).)

We independently review the trial court's first-prong rulings. (*Venegas, supra,* 18 Cal.4th at p. 85.) "[I]n reviewing the scientific acceptance of [a method] de novo under *Kelly,* we are not required to decide whether [it] is 'reliable as a matter of "scientific fact," but simply whether it is generally accepted as reliable by the relevant scientific community.' [Citation.]" (*Ibid.*)

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9 "Until 1993, [the *Kelly* test] was generally known in this state as the *Kelly-Frye* [test] because this court in *Kelly* had relied on the reasoning of [*Frye*]. In 1993, the United States Supreme Court held that the Federal Rules of Evidence had superseded *Frye* [citation], and our state law rule is now referred to simply as the *Kelly* test or rule. [Citation.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 545.)

2. *Kelly*'s Third Prong

The third *Kelly* prong is a case-specific inquiry: Were the proper scientific procedures *followed in the particular case?* (*Venegas, supra,* 18 Cal.4th at p. 78; *Pizarro, supra,* 110 Cal.App.4th at p. 554.) "The *Kelly* test's third prong does not apply the *Frye* requirement of general scientific acceptance—it assumes the methodology and technique in question has already met that requirement. Instead, it inquires into the matter of whether *the procedures actually utilized in the case* were in compliance with that methodology and technique, as generally accepted by the scientific community. [Citation.] [¶] … [¶] [Q]uestions concerning whether a laboratory has adopted correct, scientifically accepted procedures for [DNA testing] or determining a [profile] match depend almost entirely on the technical interpretations of experts. [Citation.] Consideration and affirmative resolution of those questions constitutes a prerequisite to admissibility under the third prong of *Kelly*." (*Venegas*, *supra*, at pp. 78-81.)

Although *Kelly*'s first two prongs, which were derived from the federal *Frye* test, apply to a *new* scientific procedure (*Kelly*, *supra*, 17 Cal.3d. at p. 30), the third prong applies even to evidence derived from a long-standing scientific procedure that has long since been found to have attained general acceptance. (*Venegas, supra,* 18 Cal.4th at p. 79 [whether specific steps in FBI's analysis were in compliance with long-standing and accepted methods presented questions of correct scientific procedures properly considered under third prong].)

"The *Kelly* test's third prong does not, of course, cover all derelictions in following the prescribed scientific procedures. Shortcomings such as mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination may well be amenable to evaluation by jurors without the assistance of expert testimony. Such readily apparent missteps involve 'the degree of professionalism' with which otherwise scientifically accepted methodologies are applied in a given case,

and so amount only to '[c]areless testing affect[ing] the weight of the evidence and not its admissibility' [citations]." (*Venegas, supra,* 18 Cal.4th at p. 81.)

"'"All that is necessary in the limited third-prong hearing is a foundational showing that correct scientific procedures were used." [Citation.]' [Citation.] Where the prosecution shows that the correct procedures were followed, criticisms of the techniques go to the weight of the evidence, not its admissibility. [Citations.]" (*People v. Brown* (2001) 91 Cal.App.4th 623, 647 (*Brown*).) Similarly, where there is substantial evidence showing both that procedures were followed and that they were not followed, the question is one for the jury to resolve. (*Venegas, supra,* 18 Cal.4th at p. 91.) But where defense evidence establishes a failure in procedure, and that failure is not contradicted by substantial evidence, then the evidence produced as a result of that incorrect procedure is inadmissible. (See *id.* at pp. 91-92.)

In contrast to first-prong issues, the trial court's third-prong conclusions that proper procedures were followed in a particular case are reviewed for abuse of discretion. (*Venegas, supra,* 18 Cal.4th at p. 91.) The appellate court is "required to accept the trial court's resolutions of credibility, choices of reasonable inferences, and factual determinations from conflicting substantial evidence. [Citation.]" (*Ibid.*) "We thus consider whether there is substantial evidence in the record to support the conclusion that the procedures were in fact performed in a manner fully consistent with the underlying science such that they produced reliable results. [Citation.]" (*Pizarro, supra,* 110 Cal.App.4th at p. 559.)

C. Use of the Database

Defendant contends the prosecution failed to establish at the evidentiary hearing that the database had gained general acceptance in the scientific community. Thus, he characterizes this as a first-prong *Kelly* issue. However, the use of allele frequency databases for the statistical analysis of genetic profiles has already gained general acceptance in the scientific community (see, e.g., *People v. Soto* (1999) 21 Cal.4th 512,

514-515 [use of product rule in restriction fragment length polymorphism (RFLP) analysis for statistical calculations of genetic profiles]; *People v. Reeves* (2001) 91 Cal.App.4th 14, 39 [use of product rule in PCR analysis for statistical calculations of genetic profiles]), and procedures that utilize this basic, generally accepted method need not be individually tested for general acceptance (*Venegas, supra,* 18 Cal.4th at pp. 76-79). Thus, when a particular population database is used to analyze a genetic profile in a particular case, questions about whether use of the database complies with generally accepted procedures—such as questions regarding the database's composition, size, and equilibrium—are third-prong *Kelly* issues going to whether proper procedures were used in the particular case. (See *Brown, supra,* 91 Cal.App.4th at pp. 647-655 [addressing third-prong issues, such as whether database was composed of randomly collected samples, whether database was too small, and whether database departed from equilibrium]; *People v. Axell* (1991) 235 Cal.App.3d 836, 867-868 [method used in that particular case to arrive at database and statistical probabilities was generally accepted in scientific community].)

Accordingly, in this case, we look to the record to determine whether the prosecution presented an adequate foundational showing that Harmor's use of the database comported with generally accepted scientific procedures. Harmor testified that he used the database in the Applied Biosystems Identifiler kit to statistically analyze the genetic profiles. Applied Biosystems created the database from samples collected around the United States. The database was tested by statisticians at Applied Biosystems before it was published for scientific use. The database had passed all the appropriate statistical tests. Many laboratories used the database; nongovernmental laboratories were not permitted to use the FBI database.

This evidence provided a sufficient foundational showing that Harmor complied with generally accepted scientific methods when he used the database to statistically analyze the genetic profiles to determine their frequencies in three racial groups—

Caucasian, Hispanic, and African-American. The defense argument that Harmor did not personally know the details of the database's composition or its validation does not persuade us that the trial court erred in concluding Harmor followed correct procedures when he used the database. Harmor testified that the database had been thoroughly tested by Applied Biosystems statisticians and it was used and relied upon by many other scientists at many other laboratories. This evidence supported the court's conclusion that use of the database complied with generally accepted procedures. The defense did not present any evidence to support a contrary conclusion. In sum, the trial court did not abuse its discretion in finding use of the database constituted proper scientific procedure.[10]

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10 Although we do not rely on any independent evidence, we merely note that the Identifiler kit's manual provides further details. The manual states that the "Identifiler PCR Amplification Kit … was used to generate the population data …. Samples were collected from individuals throughout the United States with no geographical preference." (Applied Biosystems, AmpFlSTR Identifiler PCR Amplification Kit User's Manual (2006) p. 4-44; available at <http://www3.appliedbiosystems.com/cms/groups/applied_markets_support/documents/generaldocuments/cms_041201.pdf> [as of April 8, 2010].) The manual explains that its database includes 357 African-American samples provided by the Kentucky State Police and the FBI, 349 Caucasian samples provided by the Kentucky State Police and the FBI, 290 Hispanic samples provided by the Minnesota Bureau of Criminal Apprehension/Memorial Blood Center of Minneapolis and the FBI, and 191 Native American samples provided by the Minnesota Bureau of Criminal Apprehension/Memorial Blood Center of Minneapolis. (*Ibid.*) Following this description, the guide includes the table of allele frequencies for several alleles in these four populations. (*Id.* at pp. 4-45 to 4-53.) The manual states that validation of the procedures is important and that experiments to evaluate the performance of the kit were performed at Applied Biosystems. (*Id.* at p. 4-2.)

We also note that the Identifiler kit's developmental validation was reported by a 2004 published article. (Collins, Patrick J. et al., *Developmental Validation of a Single-Tube Amplification of the 13 CODIS STR Loci, D2S1338, D19S433, and Amelogenin: The AmpFlSTR Identifiler PCR Amplification Kit* (2004) Vol. 49, No. 6, J. Forensic Sci. 1-13; available at <http://www.cstl.nist.gov/strbase/validation/Papers%20for%20Review/STR_Ref%202241%20Identifiler%20validation.pdf> [as of April 8, 2010].) The validation addressed the database, among other things. The article reported: "Allele frequency distributions in major population groups and relevant statistics for the loci

D. NRCII Recommendations

Defendant also raises issues he characterizes as third-prong issues—specifically, alleged violations of recommendations made by NRCII.

First, defendant asserts that Harmor did not follow NRCII's Recommendation 4.1 to use the database of the racial group of the person who left the DNA evidence, and when that racial group is unknown, to use the database of the three basic racial groups. Instead, Harmor created one general population frequency by using census data.

Defendant did not object to this evidence below and thus he has forfeited the issue. (*People v. Doolin* (2009) 45 Cal.4th 390, 448; Evid. Code, § 353; see also *People v. Geier* (2007) 41 Cal.4th 555, 610-611 [defendant's failure to timely object to admissibility of population frequency statistics associated with DNA test results forfeited

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amplified by the Identifiler kit were documented in the Identifiler kit User's Manual (N = 1187) [citation]. A subset of these samples (N = 461) was tested further for expectations of independence and approximation of Hardy-Weinberg equilibrium with no significant deviations noted [citation]. [¶] … [¶] Additionally, the samples used to generate allele frequency distributions were typed with the Profiler Plus, Profiler, and/or COfiler kits [citations]. Identifiler genotypes were tested for concordance with previous results." (*Id.* at p. 4.) "Amplification of the standards … produced correct genotypes …. Additionally, no discrepancies were observed upon comparison of Identifiler kit genotypes and genotypes from the same samples generated with previous STR [short tandem repeat] kits (N = 1187). In certain cases, the Identifiler kit was able to provide a more complete genotype …. Based upon these and other concordant results (data not shown, over 2000 samples total, and casework validation studies contributed by three forensic laboratories), the Identifiler kit was accepted by the National DNA Index System (NDIS) for DNA databasing of both offender and forensic samples to the COmbined DNA Index System (CODIS) [citation]." (*Id.* at p. 9.)

Finally, we note that apparently newer versions of the Identifiler kit use the same database and include the same allele frequency table. The manuals accompanying those kits include an evaluation of the database's Hardy-Weinberg equilibrium, finding no more departures from equilibrium than would be expected to occur by chance. (E.g., Applied Biosystems, AmpFlSTR Identifiler Direct PCR Amplification Kit User's Guide (2009) p. 100; available at <http://www3.appliedbiosystems.com/cms/groups/applied_markets_support/documents/generaldocuments/cms_065522.pdf> [as of April 8, 2010].)

issue on appeal]; *People v. Ochoa* (1998) 19 Cal.4th 353, 414 [failure to object at trial to admission of evidence under *Kelly* forfeits claim for appeal]; *People v. Coleman* (1988) 46 Cal.3d 749, 776-778 [objection to expert's selection of test used to analyze semen samples did not preserve defendant's challenge to expert's conclusions concerning statistical significance of test results].)

In any event, Harmor testified that he *did* use a database of the three basic racial groups—Caucasians, Hispanics, and African-Americans—to calculate profile frequencies in these three populations. Although he then used the three frequencies to calculate a single, more general frequency, his report contained the three separate frequencies and he stated he was prepared to present them if so requested. Thus, defendant was not precluded from eliciting evidence of these separate frequencies, but he chose not to do so. Under these circumstances, he cannot complain that the procedure was not followed and the evidence was not presented.

Second, defendant claims Harmor failed to comply with NRCII's Recommendation 4.2 to account for defendant's El Salvadorian origin and subpopulation. Again, defendant has forfeited this issue by failing to raise it below. (*People v. Doolin, supra,* 45 Cal.4th at p. 448.) Nevertheless, Harmor testified that he utilized conservative recommendations to account for inbreeding and otherwise favor defendant, and that because he did not know the perpetrator's racial group, he calculated a more general frequency. Thus, the evidence demonstrated that Harmor's procedures did account for subpopulation issues, and defendant has not shown that these procedures were inadequate.

Third, defendant says NRCII's Recommendation 4.4 was not observed because Harmor did not consider the genetic profile of mother, who could not be ruled out as a second minor contributor to the mixed sample. Recommendation 4.4, however, addresses the possibility that a relative of the suspect might be the actual *perpetrator* (NRCII, *supra,* at pp. 6, 39, 113), a situation not applicable to this case. It does not

address the situation where the evidentiary DNA sample is mixed because it includes the victim's or another person's DNA as well as the perpetrator's, which was the situation in this case. And mother's DNA *was* tested, just not by Harmor. We assume the prosecution recognized that a sample of mother's DNA had not been submitted to Harmor, and corrected the omission by submitting the sample to the regional lab.

In summary, we believe the prosecution established the necessary foundational showing under *Kelly* that proper scientific procedures were followed in this case. Defendant did not demonstrate otherwise at the hearing, and he had the opportunity to cross-examine the experts before the jury. The trial court did not abuse its discretion by admitting the DNA evidence.

II. Act Constituting Count 1

Defendant next argues the trial court erred by instructing the jury that the act charged in count 1 occurred "on or about March 8, 2008." Defendant asserts that the "on or about" language was improper because there was evidence of more than one act that could constitute a violation of section 288.7. He explains his defense was that he did not commit any act on March 8, and therefore the court's instruction undercut his defense and lessened the prosecution's burden of proof.

Defendant further contends the trial court erred in failing to instruct on unanimity with regard to count 1. He maintains the prosecutor did not elect which act constituted the crime in count 1 because the information and the instruction both referred to an act occurring on or about March 8, 2008, thereby allowing the jurors to rely on any of the incidents. We disagree with both contentions.

"'Where a defendant is charged in a single count, and the evidence shows more than one criminal act of the kind alleged, it is error to give [an "on or about" instruction] because it does not require the jury to focus on a specific criminal act and to convict a defendant of that act beyond a reasonable doubt.…' [Citation.]" (*People v. Gordon* (1985) 165 Cal.App.3d 839, 857 (*Gordon*), disapproved on other grounds in *People v.*

Frazer (1999) 21 Cal.4th 737, 765, overruled on another ground in *Stogner v. California* (2003) 539 U.S. 607, 610, 632-633 & *People v. Lopez* (1998) 19 Cal.4th 282, 292; accord, *People v. McMillan* (1941) 45 Cal.App.2d Supp. 821, 830.) The error, however, is cured if, in addition, the trial court gives a unanimity instruction. (*Gordon*, *supra*, at p. 857.)

Jurors must unanimously agree that the defendant is criminally responsible for "*one discrete criminal event.*" (*People v. Davis* (1992) 8 Cal.App.4th 28, 41.) A unanimity instruction is required when the jury could disagree which act the defendant committed but still convict him of the crime charged. (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791-792, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.) It follows that, "when the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, *either* the prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed in the words of CALJIC No. 17.01 or 4.71.5 or their equivalent that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*Gordon, supra,* 165 Cal.App.3d at p. 853, fn. omitted; see also *People v. Thompson* (1995) 36 Cal.App.4th 843, 850.)

Even if we assume defendant has not forfeited the issue by failing to object to the trial court's instruction that included the "on or about" language (*People v. Carrington* (2009) 47 Cal.4th 145, 189), we see no error. First, the information made it clear that count 1 related to an act committed on approximately March 8, 2008, and that count 2 related to an act committed between approximately September 1, 2007 and March 1, 2008. It was clear no overlap was intended in the time periods for these two counts.

Second, the evidence clearly established that the act supporting count 1 was the act that occurred on March 8.

Third, the trial court's instructions repeated the dates applicable to the counts, stressed that the two counts were distinct from each other, and required the jurors to

unanimously agree on the act or acts that constituted count 2. Specifically, the trial court instructed the jury with the following four instructions in series. First, the court instructed on count 1 with CALJIC No. 10.59.5, as follows:

> "Defendant is accused in Count one of having violated section 288.7, subdivision (a) of the Penal Code, a crime, *on or about March 8, 2008.*
>
> "Any person 18 years of age or older who engages in sexual intercourse with a child who is 10 years of age or younger is guilty of a violation of Penal Code section 288.7, subdivision (a), a crime…." (Italics added.)

Then, the court instructed on count 2 with CALJIC No. 10.41, as follows:

> "Defendant is accused in Count two of having committed the crime of lewd act with a child in violation of section 288, subdivision (a) of the Penal Code, *on or about and between September 1, 2007 and March 1, 2008.*
>
> "Every person who willfully commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the child, is guilty of the crime of committing a lewd or lascivious act upon the body of a child in violation of Penal Code section 288, subdivision (a)…." (Italics added.)

Next, the court instructed on count 2 with CALJIC No. 4.71.5, telling the jurors that they were required to unanimously agree on the act or acts constituting that crime, as follows:

> "Defendant is accused in Count two of having committed the crime of lewd act with a child, a violation of section 288[, subdivision](a) of the Penal Code, *on or about a period of time between Sept. 1, 2007 and March 1, 2008.*
>
> "In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of a specific act or acts constituting that crime within the period alleged.

"And, in order to find the defendant guilty, *you must unanimously agree* upon the commission of the same specific act or acts constituting the crime within the period alleged.

"It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict." (Italics added.)

Then the court instructed with CALJIC No. 17.02 on the distinctness of the two counts, as follows:

"Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of either or both of the crimes charged. Your finding as to each Count must be stated in a separate verdict."

Fourth, in closing argument, the prosecutor explained the charges and the acts upon which they were based to the jury, as follows:

"Two counts[:] sexual intercourse with a minor or sexual intercourse with someone 10 years or younger; and the other charge is the lewd acts to the minor or someone under 14.

"The first charge, Penal Code Section 288.7. *This and the act that occurred on March 8th, 2008*.**[11]** There are three elements that I have to prove to you, just three.

"One, the defendant had sexual intercourse with [victim]. And, again, you heard on—through the jury instructions and you'll have them to look at, that just the slightest amount of penetration is all that is needed.

"I have to prove to you [victim] is 10 years or younger, and I have to prove to you the defendant was 18 years or older.

"So obviously count—elements two and three are no issue. We know [victim] is 7—or 7 at the time, she's 8 now. And we know the defendant is over 18. [¶] … [¶]

"I must prove to you whether or not the defendant had sexual intercourse. That is what you must decide.

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11 We think it is possible the prosecutor actually said, "This *is* the act that occurred on March 8th, 2008." In any event, this statement clearly connected the act on March 8 to count 1.

"The second count involves a time frame because we heard a lot of evidence about [victim], this being done to [victim], being done before, and *the time frame is between September 1st of 2007 and March 1st of 2008.* You've heard [victim] talk about it happened—you know, two to five times I think is included in the testimony.

"And on this charge, again, there's three elements that I have to prove to you. I must prove to you that defendant touched her body. Doesn't matter where, just that there was some touching involved.

"I have to prove to you she's under 14. Again, there's no issue. The touching that was done on [victim] has to have been done with the intent—the defendant must have had the intent for pleasure. That's what it gets down to.

"Did he do it for his own personal pleasure or his own sexual pleasure of either himself or that of [victim]? [¶] … [¶]

"So it comes down to whether or not you believe … the evidence shows that he did do those acts to [victim] [¶] … [¶]

"So, Ladies and Gentlemen, you will have a verdict form. It is a two-page verdict form.

"The first page asks you to determine the sexual intercourse, the [section] 288.7, and the second page … asks you to determine whether or not you can agree to at least one act the defendant did to [victim] between September 1st and March 1st, 2008." (Italics added.)

Based on our review of the entire record, we believe it was clear to the jurors that count 1 was based on the act of sexual intercourse that occurred at the nursery on March 8, and no other act. The evidence clearly established one act of sexual intercourse occurring in the time period around March 8 and the prosecutor plainly laid out, or elected, the act on March 8 as the one constituting count 1. We are convinced beyond a reasonable doubt that the jurors understood which single act supported count 1. Thus, the "on or about" language did not refer to more than one act and the court had no obligation to instruct on unanimity.

III. Due Process Notice

Lastly, defendant contends he was not given adequate notice of the charges against him because he was not advised of the specific act that formed the basis of the charge in count 2.

Defendant acknowledges that this issue has been resolved against him and we are obligated to reject it here. (*People v. Jones* (1990) 51 Cal.3d 294, 322-323; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

_____
Kane, J.

WE CONCUR:

_____
Hill, Acting P.J.

_____
Poochigian, J.